

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 24, 2007

CLARENCE W. CARTER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 99-C-1975 Steve Dozier, Judge

No. M2006-02285-CCA-R3-PC - Filed December 12, 2007

The petitioner, Clarence W. Carter, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel at his trial and at his sentencing hearing. After a thorough review of the record and the parties' briefs, the judgment of the post-conviction court denying post-conviction relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P. J., and ROBERT W. WEDEMEYER, J., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Clarence W. Carter.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III., District Attorney General; and Amy Eisenbeck and John Zimmermann, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

After a jury trial, the petitioner was convicted of conspiracy to sell 300 grams or more of a substance containing cocaine and one count of possession with intent to deliver 26 grams or more of a substance containing cocaine. He was sentenced as a Range II, multiple offender to consecutive sentences of 32 years for the conspiracy conviction and 16 years for the possession conviction. This court affirmed the petitioner's convictions and sentences on direct appeal. *See State v. Clarence W. Carter*, No. M2000-02230-CCA-R3-CD, 2002 WL 31370469 (Tenn. Crim. App., at Nashville, Oct. 21, 2002). The Tennessee Supreme Court granted review and affirmed the petitioner's convictions but found error in the imposition of the petitioner's sentence for conspiracy as a Range II, multiple offender and remanded for re-sentencing. *See State v. Carter*, 121 S.W.3d 579 (Tenn. 2003). Thereafter, the petitioner was re-sentenced on his conspiracy conviction to 25 years imprisonment

as a Range I, standard offender to be served consecutively to his prior sentences. On appeal after remand, this court affirmed the sentencing decision of the trial court. *See State v. Clarence W. Carter*, No. M2004-00757-CCA-R3-CD, 2005 WL 1307807 (Tenn. Crim. App., at Nashville, June 1, 2005).

The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

Months of police surveillance culminated on November 19, 1998, with various searches and the arrest of the defendant and Reginald Hutchinson, an acquaintance of the defendant's. Prior to that date Officer Aaron Thomas had conducted "trash pulls" at 113 Bess Court, where the defendant resided, and 1218 Fifteenth Avenue, South, where Hutchinson lived. On the 12th of November, Thomas recovered significant items from the Fifteenth Avenue trash. Among the items obtained were: 1) an empty box of baggies, which are often used to package cocaine for distribution; 2) an invoice bearing one of the defendant's girlfriend's names; 3) documentation with the defendant's name thereon related to a BMW 635CSI; 4) around eight small baggies; and 5) a large bag having white powder residue. The officer field tested this substance and obtained a positive result for cocaine. Furthermore, a police drug dog later indicated by behavior that cocaine had been in the baggies. Latex gloves were also recovered at this location, and Thomas explained that drug dealers often use these to prevent cocaine from absorbing into their skin when handling it. Additionally, in a trash pull on November 19th prior to the execution of the search warrant, the police recovered around eight baggies with powder residue, which tested positive for cocaine; more documents/mail with the defendant's name on them (though not addressed to the Fifteenth Avenue address); a set of latex gloves; and a bottle of Inositol. Thomas related that dealers use Inositol as a "cutting agent" to mix with the cocaine, thereby creating greater quantity though less purity.

Based on this and other information garnered during the surveillance, Thomas obtained a search warrant for 1218 Fifteenth Avenue. Less than half an hour before the execution of the warrant, the defendant arrived at this address and entered the home. According to Sergeant James William McWright the defendant came back outside to retrieve a white plastic bag from a BMW parked there. As the defendant re-entered the home, McWright could not tell what the bag contained but could observe that it was not empty.

When the police subsequently entered the house to execute the search, Hutchinson stood in the vicinity of the front door and was detained on the front porch. At that time the defendant was in the area of the couch in the living room. According to Officer Ernest Edward Rigsby the defendant threw white powder at this time. This officer also stated that, when asked what he (the defendant) was trying to do with the cocaine at the time the officers entered, the defendant responded that "he was trying

to knock it off the table.” Thomas later recounted that he too saw baggies and white powder fly across the room upon entering the home. Furthermore, the authorities found a black bag containing plastic baggies, rubber/latex gloves, and a small electronic scale likely within the defendant’s reach. Another set of scales was located on the living room floor beside the coffee table near the defendant. Rigsby stated that these scales were the type used to weigh small amounts such as the quantities in which cocaine is sold. Approximately seven hundred dollars was also found at the scene. Moreover, in various visible places throughout the room, the police discovered additional bags of white powder. Some white powder was even found in the aforementioned white plastic bag, and an unaccounted for amount lay loose on the floor from being thrown. Officer Danny Eddings scooped a portion of this together for collection and bagged it for testing.

The authorities sent the white powder in baggies to the Tennessee Bureau of Investigation (TBI) to determine what the substance was. A forensic scientist from the TBI testified that the aggregate of the powder sent for testing constituted two hundred ninety-four grams of a substance containing cocaine.

Beyond this proof the State presented evidence concerning the financial records of the defendant and Anita Jackson, the girlfriend with whom he was living when arrested. An arguable discrepancy constituting tens of thousands of dollars existed between what these individuals allegedly earned and the money flowing through Anita Jackson’s accounts.

Further evidence pointed to a variety of cars owned and/or driven by the defendant during the surveillance period. Included among these were an older model Honda Prelude with body damage, an older model BMW, a relatively new Toyota 4Runner, and a 1997 or 1998 Mercedes Benz Kompressor. According to a statement that the defendant made to one of the officers who testified at trial, the defendant had paid for the Prelude but titled the car in Hutchinson's name. The State presented the title confirming that the vehicle was registered to Hutchinson. Additional documentation retrieved from the aforementioned BMW listed the defendant as the customer for repairs made to both the Prelude and to the BMW (though Hutchinson had been driving the BMW during the day of the arrest).

In presenting its case, the defense called Hutchinson to the stand. This witness testified that the defendant was an innocent man who had no part in the witness’ criminal activity. Hutchinson also attempted to account for the defendant’s presence at the Fifteenth Avenue address on the day in question by relating it to the defendant’s allegedly purchasing the Prelude from the witness. Furthermore, Hutchinson took the blame for throwing the cocaine in the air at the time of the arrest; offered an explanation for the defendant’s involvement in repairs to the BMW; stated that the defendant had known nothing about the weapon hidden in the couch,

etc. The defendant also called Anita Jackson who attempted to explain the excess cash flow above-referenced.

Clarence W. Carter, 2002 WL 31370469 at *1-3 (footnotes omitted).

The petitioner filed a timely pro-se petition for post-conviction relief. Thereafter, counsel was appointed, an amended petition was filed, and an evidentiary hearing was held. At the hearing, the petitioner complained that his trial counsel was ineffective because counsel failed to inform him of his right to allocute at his initial sentencing hearing. The petitioner asserted that he did not get to allocute at his initial sentencing hearing though he wanted to. The petitioner noted that he understood allocution as addressing the court and pleading to the court for leniency in sentencing. He said he did not know that he had the right to allocute until after his first sentencing hearing. The petitioner further complained that at his second sentencing hearing he was allowed to take the witness-stand, but he was improperly questioned by the state and the court when he just wanted to plead to the court for leniency on the sentence. He asserted that counsel failed to prepare him for questions at the second sentencing hearing. According to the petitioner, the trial court relied on the same enhancement factors used in the original sentencing hearing and ordered him to serve the maximum sentence in the range for a Range I offender when he was re-sentenced even though he was not sentenced to the maximum when he was originally sentenced as a Range II offender.

The petitioner next complained that counsel was ineffective for calling his co-defendant, Reginald Hutchinson, to testify at his trial. The petitioner acknowledged that Mr. Hutchinson testified that the drugs were his; however, the petitioner did not believe that Mr. Hutchinson's testimony was favorable to his defense. The petitioner further asserted that counsel did not prepare Mr. Hutchinson to testify at trial. The petitioner claimed that he had won approximately \$50,000 from legal gambling in Illinois over a period of a few years in the late 1990's. The petitioner said that he explained this fact to counsel, but counsel did not utilize this information to contradict the state's argument that the petitioner received and laundered money from the sale of the cocaine. The petitioner also asserted that counsel was not effective enough to suppress evidence found after an unlawful search of his house though the petitioner acknowledged that counsel filed a motion to suppress and attempted to suppress the evidence at a hearing.

The petitioner further complained that he was originally indicted for possession of 26 grams of cocaine but the state improperly amended the indictment at the end of trial to possession with the intent to sell or deliver 26 grams of cocaine. The petitioner also asserted that he received "two pieces of paper" alleging that he conspired to deliver 292 or 294 grams of cocaine, but he was charged and convicted of conspiracy to deliver 300 grams or more of cocaine and nothing was done about the error in proof.

On cross-examination, the petitioner admitted that he told counsel that Mr. Hutchinson was willing to testify on his behalf. When asked why he did not allocute in the presentence report, the petitioner asserted that counsel told him, "[d]on't say nothing to them and don't answer no questions." The petitioner also claimed that he did not know that his statement in the presentence

report would serve as an allocution. The petitioner said that he and counsel only met once to discuss his case and did not discuss trial strategy. The petitioner stated that if he knew he “was facing all this time,” he would have “copped out” and pled guilty even though he was not guilty.

The petitioner’s trial counsel testified that the state had made no plea offer in the case and this fact was discussed with the petitioner. Counsel could not recall how many times he met with the petitioner but stated that he was positive it was more than once. Counsel stated that he investigated the petitioner’s case extensively. Counsel recalled that he talked to the petitioner’s mother numerous times regarding the allegations that the petitioner laundered drug money through her account. Counsel reviewed three bank accounts in an effort to refute these allegations. Ultimately, the petitioner was acquitted of the charges of money laundering and unlawful possession of a weapon. Counsel stated that he talked to Mr. Hutchinson and his attorney before calling Mr. Hutchinson as a witness. Counsel asserted that the petitioner knew that Mr. Hutchinson was going to testify and knew the expected content of his testimony.

Counsel testified that he advised the petitioner not to give his version of the events to the author of the presentence report in order to preserve the petitioner’s constitutional right against self-incrimination and because the petitioner’s testimony would not be helpful in sentencing. Counsel asserted that, in his opinion, allocution was generally ineffective and worthless in a sentencing hearing setting. Counsel noted that allocution might be beneficial and appropriate in a vehicular homicide case where a defendant may need to express remorse and condolences to the victim’s family. Counsel submitted that “if somebody’s gonna ask for mercy from the court and suggest facts are different than what a jury has found, then he obviously subjects himself to cross-examination. . . .” Counsel stated that he did not recall the petitioner expressing interest in making an allocution at the first sentencing hearing. In fact, the petitioner chose not to testify at the first sentencing hearing but did testify at the second sentencing hearing and was subject to cross-examination. Counsel recalled that he discussed the ramifications of testifying at the second sentencing hearing and the petitioner chose to testify. Counsel believed that the petitioner did an excellent job in testifying at the second hearing, but his testimony did not sway the court.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In a written order the post-conviction court specifically addressed each of the petitioner’s allegations and denied the petition for post-conviction relief. The petitioner now appeals.

ANALYSIS

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court’s findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court’s factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction

court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Once the petitioner proves that counsel's representation fell below a reasonable standard, the petitioner must also prove prejudice. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* In considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984).

On appeal, the petitioner claims that he received the ineffective assistance of his trial counsel. In particular, the petitioner claims that trial counsel was ineffective in failing to advise the petitioner of his right to allocute at his first sentencing hearing. The petitioner also claims that trial counsel was ineffective in failing to prevent him from being cross-examined when he took the stand at the re-sentencing hearing.

An allocution statement is "an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination." Black's Law Dictionary (8th ed. 2004); *see also State v. Keathly*, 145 S.W.3d 123 (Tenn. Crim. App. 2003). Pursuant to Tennessee Code Annotated section 40-35-210(b)(7), a defendant is allowed to allocute before a sentencing judge or jury. This section provides, that as part of the court's sentencing determination, a court shall consider any statement the defendant wishes to make on his own behalf.

In addressing these claims, the post-conviction court found that the petitioner's claim regarding his failure to allocute at the first sentencing hearing was moot because he had a second sentencing hearing in which he was allowed to allocute. The court further found that petitioner could have avoided cross-examination by making a statement within the presentence report; however, the petitioner chose not to. The court also noted that the petitioner's testimony at the second sentencing hearing was not overly damaging and did not rise to the level of a constitutional violation. Accordingly, the court concluded that the petitioner did not carry his burden of proving ineffectiveness of counsel by clear and convincing evidence.

Upon review, we see nothing in the record to preponderate against the findings of the post-conviction court. Clearly, the right to allocute is dependent on a desire and decision to allocute. The testimony of counsel at the post-conviction hearing indicated that the petitioner was cautioned against making an allocution statement in his drug case as such a statement would hurt his case. The testimony of counsel also indicated that the petitioner showed no interest in making an allocution statement at his first sentencing hearing and there is nothing in the record, including the petitioner's sentencing hearing transcript, that suggests otherwise.

Regarding the petitioner's allocution at his re-sentencing hearing, the record reflects that the petitioner was permitted to allocute, whereupon, he conveyed his remorse and regret over his bad decisions and criminal behavior. The record further reflects that the state prosecutor improperly cross-examined the petitioner after his allocution statement. However, the record reflects that the petitioner's counsel objected to the prosecutor's cross-examination of the petitioner. Also, the record shows that the prosecutor's improper cross-examination of the petitioner did not reveal any evidence not already on record. Furthermore, the record shows that the trial court considered the petitioner's allocution statements when re-sentencing him, but nonetheless, the court enhanced the petitioner's sentence by five years based on his previous history of criminal convictions and the fact that he had committed a felony while on probation. The trial court's sentencing decision was affirmed by this court on appeal. *See Carter*, 2005 WL 1307807, at *4. Therefore, with regard to his allocution, the petitioner has not proven either deficient performance of counsel or prejudice. The issue is without merit.

The petitioner next claims that counsel was ineffective in calling his co-defendant, Reginald Hutchinson, to testify at trial. Regarding this issue, the post-conviction court accredited the testimony of trial counsel, who stated that Mr. Hutchinson was adequately prepared to testify and his testimony was favorable to the defense in that he claimed sole ownership and possession of the drugs confiscated in the case against the petitioner. The court then found that the petitioner failed to carry his burden of proof in accordance with *Strickland*. Upon review, it is abundantly clear from the available record, including the facts summarized on direct appeal, that the petitioner failed to prove this claim by clear and convincing evidence. The issue is without merit.

The petitioner next claims that counsel was ineffective in not attempting to prove that the petitioner had gained \$50,000 from legitimate gambling ventures rather than from illegal drug transactions. The post-conviction court found that the petitioner failed to provide proof of his

gambling winnings at the post-conviction hearing. The court further noted that the state had presented the petitioner's income tax returns for 1997 and 1998 showing income just over \$28,000 each year. In contrast, the state also presented evidence of deposits over \$46,000 for 1997 and deposits over \$132,000 for 1998. The court opined that even if the petitioner had proven he had received \$50,000 from gambling, the evidence would have been little help to the petitioner's case in light of the state's evidence. We agree. Other than his own self-serving testimony, the petitioner produced no evidence substantiating his claim. As such, we conclude that the court properly found that the petitioner failed to prove this allegation by clear and convincing evidence, and the petitioner is not entitled to relief.

The petitioner next claims that his counsel was ineffective in failing to effectively suppress evidence seized during a search of his home. Addressing this issue, the post-conviction court found the following:

[Counsel] testified that he did file a suppression motion in this case on the issue of the "trash pulls" at the petitioner's residence. This issue was addressed in the initial appeal. The petitioner did not put on any proof as to how [counsel] was ineffective in this regard other than the motion not being granted. Therefore, as to this issue, the petitioner has failed to carry his burden by clear and convincing evidence in accordance with *Strickland*

We agree with the post-conviction court's findings. Our review of the suppression hearing transcript reveals that counsel filed a motion to suppress the evidence taken from the petitioner's home and effectively represented the petitioner at the hearing on the motion to suppress. Nonetheless, the trial court held that the evidence was not subjected to an illegal search and seizure. To reiterate, success or perfection is not the standard of measure for counsel's performance; rather, a petitioner is entitled only to constitutionally adequate representation. *See Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). We also note that the petitioner did not support this argument with any citation to authorities or appropriate references to the record. *See* Tenn. Ct. Crim. App. R. 10(b). Accordingly, we determine that the petitioner failed to carry his burden to show that trial counsel was ineffective and the issue is without merit.

The petitioner next claims that counsel was ineffective in failing to successfully argue (1) that the amended charge in count two of the indictment was in violation of the petitioner's constitutional rights, (2) that the petitioner should not have been charged with conspiracy to deliver over 300 grams of cocaine and the jury should not have deliberated on this charge, and (3) that the petitioner should not have been re-sentenced at the top of Range I with the same enhancement factors used from the original sentencing hearing.

Addressing these issues, the post-conviction court found that the petitioner's claims concerning the validity of the indictments, the sufficiency of evidence, and the use of enhancement factors had been previously raised and ruled upon at the appellate level. We agree. While these claims are packaged as ineffective assistance of counsel claims, a close inspection of these claims

show they are nothing more than a thinly veiled attempt to re-litigate issues previously determined on appeal. It is well-established that post-conviction proceedings may not be employed to raise and re-litigate issues previously determined on direct appeal. *See, e.g., Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001). In the instant case, this court and our supreme court reviewed the petitioner's claims concerning the validity of the indictments, the sufficiency of the evidence, and the imposition of his sentence, and rejected them at that time. *See generally Carter*, 121 S.W.3d 579; *Clarence W. Carter*, 2005 WL 1307807; *Clarence W. Carter*, 2002 WL 31370469. Clearly, the appellate record demonstrates the competence of counsel in preserving these issues at trial and on appeal, and these issues, having been previously determined on appeal, are not subject to further review by this court. Even assuming *arguendo*, that these claims are valid, we note that the petitioner's testimony with regard to these claims is greatly lacking in detail as to how counsel's representation was deficient and how any deficiency prejudiced his case. We also note that the entirety of the petitioner's appellate argument as to these claims consist of a few sentences with no citation to authorities, or references to the record to support these claims. Therefore, it is clear that the petitioner failed to prove these claims by clear and convincing evidence and they are without merit.

CONCLUSION

The petitioner has failed to meet his burden of proof regarding his claims of ineffective assistance of counsel, and the post-conviction court correctly denied the petition. Therefore, the judgment of the post-conviction court is affirmed.

J.C. McLIN, JUDGE